

OGC HAS REVIEWED.

COMPENSATION

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STATINTL

8 March 1950

Legal Staff

Legal Considerations Involved in Service to the Government by Persons Receiving Compensation from Private Sources.

1. The extent to which persons in the Government service may continue to receive compensation from sources outside the Government--either private industry or professional relationship-- is a troublesome question to which there is no altogether iron-clad answer. The statutory restrictions are clear, of course, but over and above these are various practical and ethical considerations which depend upon the particular functions of an individual and his own private relationships and duties to the Government. Probably the most inclusive and concise guide is found in the Attorney General's opinion in 40 Comp. Gen. 187. He points out that there are (1) certain specific public offices where statutes restrict the activities of their holders (i.e., Secretary of the Treasury, the Treasurer, Register of the Treasury, etc.); (2) certain types of general prohibitory statutes applicable to large classes of Government officers; and (3) apart from the statute, certain principles of fair dealing which have the force of law and which are applicable to all officers of the Government." As the Attorney General says in "Summary: Except with reference to the specified public offices mentioned under (1) above, the law does not prohibit a public officer from carrying on a private business activity for compensation, at least when the private activity is unrelated to any business of the Government. When the private activity does touch upon some interest of the Government, it may be continued only when it falls outside the bar of the statutes and principles of law which are listed in (2) and (3) above, and which are aimed primarily at improper conflicts of interest." Public service is in the nature of a public trust and since conflicts of interest would not be tolerated in the case of a private fiduciary, "they are doubly proscribed for a public trustee." Our concern here is restricted to (2) and (3). In order to understand the statutory prohibitions, it may be well to describe them briefly.

2. The following provisions of the U. S. Code pertain to the restrictions on persons in the Government service who are simultaneously engaged in private, commercial, or professional activities from which they receive compensation in some form:

(a) 18 U.S.C. § 261 makes it an offense for a Government employee to receive or agree to receive (directly or indirectly) compensation for services rendered by himself or another in relation to any proceeding, contract, claim, controversy, charge, accusation or arrest, or other matter in which the United States is a party, or directly or indirectly interested, before any department or agency of the Government. (This is exceptionally general and very restrictive.)

(b) 18 U.S.C. § 203 - makes it a crime for a Government employee to act as an agent or attorney in prosecuting any claim against the United States other than in the proper discharge of his official duties.

(c) 18 U.S.C. § 204 - makes it an offense for an ex-employee of the Government to prosecute a claim against the United States as principal, counsel, or agent within two years after the end of his employment, provided the subject matter is directly connected to his previous duties:

(d) 5 U.S.C. § 99 - makes it unlawful for any ex-employee of the Government to prosecute a claim against the United States as counsel or agent within two years after the termination of his employment if the claim was pending in any agency of the Government at the time he was so employed.

(e) 18 U.S.C. § 434 - provides criminal penalties for a Government employee who transacts business in his official capacity with a private interest in which he is identified (directly or indirectly) from a pecuniary standpoint.

(f) 18 U.S.C. § 216 - provides criminal penalties for Government employees who obtain any material benefits through Government procurement.

(g) 18 U.S.C. § 1914 - makes it an offense for a Government employee to receive any salary in connection with his services as such employee from any source other than the Government, and for any legal entity to make such a contribution.

(h) 31 U.S.C. § 665 - is a general statute which prohibits, among other things the Government's acceptance of voluntary services without reimbursement.

3. While the problem may vary with each case, there are several general situations which can be anticipated. We will list these and then indicate the legal conclusions applicable to each:

(a) The employee receives compensation for services from private sources and also compensation for services from the Government;

(b) The employee is on leave of absence with pay from a private source and also receives full pay from the Government;

(c) The employee receives a portion of his pay from a private source and also receives full pay from the Government;

(d) The employee is paid by the Government for his services and receives additional payments from private sources;

(e) The employee receives full pay from private sources and acts at the same time as a consultant to the Government on a per diem basis;

(f) The employee is on leave of absence with pay from a private source, and donates his time free to the Government.

4. In the first situation listed above, the Government official receives pay from a private source for services performed outside the Government at the same time he receives compensation for his Government services. We have seen from the above statutory restrictions that there has been no Federal law which prohibits payment or receipt of compensation to a Government employee from both the Government and private sources. (See 22 Comp. Gen. 179). Provided that the nature of an employee's duties and their relation to his private activities do not create a conflict of interest which is questionable as a matter of policy, there is no objection to this relationship.

5. In the second situation, where the employee is on leave of absence with pay and receives, at the same time, full pay from the Government, the situation is similar, and provided the official duties do not conflict with the private interest, here again there is no legal objection.

6. The third situation seems to be almost identical to that just indicated; the distinction being that the employee is receiving only a portion of his pay from a private source. As long as the private remuneration is related to his private interest, and has no connection with the services performed for the Government, there is no statutory or ethical objection to this arrangement.

7. In the fourth set of facts outlined above, the employee receives pay from the Government for his services and at the same time is compensated by a private source for those very same services. This is clearly prohibited by statute in 15 U.S.C. 1914, and even the superficial appearance of this situation should be avoided.

8. In the next case, the employee receives full pay from his private source while acting at the same time as a consultant to the Government on a per diem basis. This is specifically sanctioned by P.L. 263 (See Section 305). Provided - as the statute indicates - there is no clear conflict with his private interests, there is no prohibition here.

9. In the last case, the employee is on leave of absence with pay from a private source and contributes his services to the Government without pay. The last statute listed above (31 U.S.C. § 655) prohibits the acceptance of such voluntary services. We assume, of course, that the situation implies a certain continuity of service and is not applicable to isolated occasions when Government seeks the informal counsel of a consultant who is not sworn in as an officer. If there is any degree of formality in the consultation, it would be advisable to recognize the advisor's service as such and pay him a fee within the statutory limit.

10. In the third general category, where there is no applicable statutory prohibition, but the person's fiduciary relationship to the Government as an employee may be jeopardized by his personal private interests, there is no hard line of delineation and we must rely on the dictates of common sense and discretion for guidance. As long as there is no "conflict of interest" - either direct or indirect - and the private compensation is distinct and unrelated to official functions or duties, it is not proscribed by law or ethics. However, prudence would seem to require a careful review of each case. We are aware that this is somewhat general in context, and regret that a more specific guide is not advisable. We shall be pleased, of course, to give an opinion in those cases which fall within the broad twilight zone of "conflict of interest."

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Legal decisions